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Supreme Court of the United States.

October Term, 1930.

No. 57.

Story Parchment Company,
Petitioner,

v.

The Paterson Parchment Paper Company
and
Kalamazoo Vegetable Parchment Company.

REPLY BRIEF FOR THE PETITIONER.

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Supreme Court of the United States.

OCTOBER TERM, 1930.

No. 57.

STORY PARCHMENT COMPANY,
PETITIONER,
v.
THE PATERSON PARCHMENT PAPER COMPANY AND KALAMAZOO VEGETABLE PARCHMENT COMPANY.

REPLY BRIEF FOR THE PETITIONER.

Introductory.

The defendants' brief seeks to sustain the result reached by the majority of the Circuit Court of Appeals, without attempting to support the principle upon which it is based.

That principle is that harm resulting from concerted acts in violation of the Anti-Trust laws does not constitute legal damage if similar acts, unconcerted, would have produced the same results. The fallacy of this principle we have pointed out in our original brief, point I, 13-19. That argument, as well as the argument of the dissenting opinion, the defendants' brief does not attempt to answer.

Three-fourths of the brief is devoted to the argument that "there is no evidence that the defendants' acts were a combination to monopolize or to restrain trade" (Resp. Br. 10-45). On this issue all the judges of both lower courts

agreed that there was sufficient evidence of a conspiracy so to fix prices as to injure and destroy the plaintiff's business. We understand the rule to be well settled that this Court will not enter into an analysis of the evidence which both courts below have concurred in finding sufficient.

Boehmer v. *Pennsylvania R.R. Co.*, 252 U.S. 496.

On the question of damage the defendants argue that the plaintiff failed to show that there was any relation of cause and effect between their acts and the plaintiff's losses. The gist of their argument is that it cannot be known whether there was any such causal relation, since the evidence fails to disclose what would have occurred under other conditions which did not in fact exist.

But, of course, it is not necessary to exclude the possibility of the same result under all hypothetical conditions in order to prove the existence of cause and effect. The direct consequences of an act may be observed even though it is never known what might have happened but for the act. The consequences of a price war to those persons against whom it is directed are, we believe, sufficiently plain and direct and well known so that they may be recognized.

It is to be observed that the defendants in their brief choose not to rest upon the Appellate Court's assumption (or finding) that the plaintiff could not have succeeded as in any way controlling. In their brief they concede that "This is emphasis only . . . to the total absence of any evidence to the contrary," reverting to the argument that "the controlling fact is the absence of any evidence to support the plaintiff's contention" (Resp. Br. 4).

However, what might have happened under different circumstances is necessarily an inference to be drawn from what actually happened under existing circumstances. Of these actual existing circumstances the plaintiff put in plenary evidence—a broad picture of the industry as a whole, the position held by the plaintiff and the conspirators in it,

the entire history of the plaintiff's and the conspirators' operations during the period in question, the plaintiff's investment, equipment, personnel, customers, sales, costs, and expenses, and an account of all that happened in the course of the competition between the plaintiff and the conspirators. Our original brief contains a discussion of the evidence upon these points (19-33).

This reply brief deals, therefore, not with an attack upon the reasoning of our original brief, for none is made, but with points raised by the defendants in their brief as to the inferences which the jury were entitled to draw upon the evidence.

I.

The jury were entitled to draw the inference that the plaintiff would have succeeded unless attacked by the defendants' combined action.

We have pointed out in our original brief evidence sufficient, as we believe, to justify the jury in their opinion that the plaintiff would have succeeded but for the conspiracy (Point III, 22-33).

In the actual situation that existed at the time, the defendants and the West Carrollton Company themselves believed that the plaintiff would succeed unless attacked by their combined action—otherwise they would not have found it necessary to combine to defeat the plaintiff. If these companies, which obviously knew the business better than any one else, inferred this from the circumstances, and based their course of action upon that inference, surely the jury were not unreasonable in drawing that same inference.

The Paterson, Kalamazoo, and West Carrollton companies, knowing the parchment paper business, were at least as well qualified as the court below to gauge the strength and prospects of the Story Company.

As soon as they heard of the Story project, their agents, having done "considerable gum shoeing" (R. 93), sent in full data to their managers about the organization, personnel, capital, equipment, and plans of the Story Company (R. 101, 105, 106, 113, 115, 116, 117, 119, 127, 132, 134). On November 7, 1927, one sales agent wrote to his manager (R. 115-116):

> "The Institute and also other large buyers have been looking for a long time for some mill to start that is outside of the big three and it is going to be different from the Imported proposition—they, that is the big buyers and the Institute if this mill once gets going are going to give it enough biz to keep it alive—as they need it—for competition. . . . We ought to go after this bunch right now and keep them away from the Institute—your big biz with Morrell, St. Louis Packers etc. is liable to be jeopardized. . . . But I think we ought to beat them to it—if we did not have this Institute bug-a-boo I would not think so—but with Institute to figure in on the deal—I believe it makes a serious situation."

A month later he advised that, if Story can "make good" on price and quality, the situation could change overnight (R. 193). At a later date the representative of another company wrote to his principal, commenting on the large volume of Armour and Swift business acquired by Story (R. 380):

> "I have been expecting right along both Swift and Armour would give Story some business for that would be in line with the policy of these packers to keep competition alive."

Another letter reports that the president of the Institute of American Meat Packers, "feeling that Story competition should be encouraged," gave instructions to his buyers to give their business to Story (R. 410).

The correspondence between the conspiring companies and within their respective organizations amply demonstrates their serious concern over the progress of plaintiff and their persistent belief in the necessity of drastic, combined action to bring about its failure.

In less than two months we find the defendants acknowledging that Story is producing a very good product (R. 260, 274, 276). The Paterson and Kalamazoo companies had to improve the quality of their product because of the superior imperviousness to grease of the Story product (R. 265, 266, 337, 341).

The old companies recognized that the Chicago sales agent selected by Story was "the best man they could have picked to introduce their sheet into the Yards" and that he would be "quite a competitor if Story's sheet ever does develop into a good quality sheet" (R. 174); that he had "an entree that will be valuable to Story" (R. 191). It was acknowledged that his representation of Story would cause the defendants "much unpleasantness in the yards," and that they might "have to do something to offset it before long" (R. 193-194).

Paterson's sales manager reported that Story would furnish "stiff competition" (R. 223). Kalamazoo's sales agent was "nervous" and "worried" over the situation, fearing "disastrous results" (R. 231, 287). Kalamazoo said it was "a dead sure cinch" that Story "would get some business no matter what the prices are" (R. 246); Paterson stated that conditions were "disturbing" (R. 260); and West Carrollton said that Story was "entrenched" and that "We better get our armor on and go to battle" (R. 271). The representative of one of the companies complained that Story was "making a very strong drive thru the Institute of Meat Packers for the business of the different packers who belong to this organization, and I believe that it covers practically every packer of importance" (R. 285). In another letter we find the statement that Story was receiving "the cream"

of the Armour business (R. 420); that the "situation is getting serious," and the recommendation "that we have reached the point where *we ought to reduce the price to a point where Story will have to quit—otherwise they will get too good a foothold*—with these large accounts where the major portion of the tonnage is" (R. 421). The sales manager of another company writes to the sales agent telling how he is "sweating now under the new activity" (R. 421). We read in another letter: "*We are not fooling ourselves a bit and are working right along with the supposition that Story is going to make parchment indefinitely*" (R. 459).

The three old companies planned their concerted action with the specific intent of destroying the plaintiff, because they believed that this was necessary. *They* did not dare to trust in the company's assured failure, which the Appellate Court so complacently assumes.

At the very start of plaintiff's business the suggestion was made by a sales agent to his principal that Story be given "a run for their money right now when they are trying to get started," with the caution added: "let's keep it awfully quiet however" and not "even intimate that conditions force us to do something" (R. 186). The principal replies to his agent that new price lists are being figured, but "don't tell it to your very, very best friend"; that the letter should be destroyed "so it won't get into the files"; that "while it may appear that it is going to be a disturbing situation for a little while, you can rest assured that *it will not last long*" (R. 187). Another letter suggests that "now is the time to enter the fray and on a basis that our new competitor will not be able to declare 100% stock dividends," and recommends that something be done and be done quickly, and this should be to double the trade discount allowed by Story (R. 278). In the letter of another defendant it is asserted that the best policy is to "rip the market wide open and give them [Story] a battle with the idea of making it short and sweet" (R. 430).

The defendants watched the Story company organize, they knew the value of the business which the Story Company developed, they tested its product and heard reports about its excellent qualities, they obtained surreptitiously drawings of the Story Company machine, they knew of its capital, its organization, its production, and marketing methods. Knowing all these conditions, knowing the parchment paper business and its status, they determined upon combined action in the form of ruthless, drastic, successive, and intensive price reductions in order to destroy the Story Company. They determined that they would rather violate the law and run the risk thereof than permit the Story Company to develop under lawful conditions. Their "actions speak louder than words" that they believed the failure of the plaintiff was not an assured thing; that plaintiff would survive and succeed; that combined action was necessary in order to put an end to plaintiff's business.

The defendants' express statements thus support the inferences from their actions.

The jury, with all the facts and circumstances which confronted defendants, and also the acts and admissions of the defendants in evidence, surely were entitled to draw the same inference and arrive at the same conclusion as the defendants themselves repeatedly affirmed before they were summoned to court.

II.

Conclusion of the Court of Appeals that plaintiff's failure was inevitable from reductions in prices which it was assumed the defendants would have made severally, or from lack of capital or inefficient management, was not a necessary conclusion from the evidence, and was wholly unwarranted.

We have pointed out that defendants themselves frequently referred to the plaintiff's progress, asserted their

assurance it would endure, and planned concerted measures to achieve its destruction. These executives and representatives of the parchment paper companies were, by their technical knowledge and business experience in this particular field of endeavor, well qualified to judge the strength and future prospects of the Story Company.

The majority of the Court of Appeals say what the defendants would have done under hypothetical conditions of fact—the "moral certainty" as to what they would have done "according to Nature's first law." Such assurance seems strange by comparison with the doubts, uncertainties, and hesitancies of students of economics, industry, and business.

First, it cannot be said that it was clear as a matter of law or "according to Nature's first law" that defendants would have reduced prices equally acting severally. Price warfare, to be successful, must generally be aggressive and acute, for "within a few months the attempt is likely to be a success or a failure" (Henderson, Federal Trade Commission, 259-260). Unless the attack is carefully planned and co-ordinated, it may do more harm to the aggressors than to the object of attack.

Secondly, it cannot be assumed that, if price reductions were made by defendants without concerted action, they would have destroyed plaintiff. There is a special power of coercion in a combination which does not exist in individual effort. "The number and the compact give weight and cause danger."

> *Mulcahy* v. *The Queen*, L.R. 3 H.L. 306.
> (And cases cited in our original brief, p. 21.)

The court's conclusion that plaintiff's "failure was inevitable either from lack of capital or inefficient management, or both," leaves one in doubt as to just which was conclusively presumed. If the force of all evidence is to

be overturned by an assumption of the court, it would seem that such assumption would be something specific.

Are the courts in a position to make a conclusive determination as a matter of law of how much capital was a *sine qua non* for the establishment of a business making parchment paper? Here again the conclusion of the appellate judges is contradicted by the judgment of the bankers and business men who dealt with the situation. The stockholders who invested in the company were mature and successful business men of wide experience (R. 546). They believed in the prospect of success or they would not have invested their money. The bank which lent the company $70,000 thus signified to a like belief. The paper company which supplied waterleaf paper for parchmentizing granted a credit of $65,000, showing that it had a like opinion.

We have already pointed out that the defendants' admissions demonstrate the lack of any basis for claiming plaintiff inefficient. It had a more efficient parchmentizing machine than the other companies, produced a paper in some respects better than that of defendants, and had the very best possible sales representation.

The majority comment disparagingly upon the fact that the Story Company was running at about half capacity for five months. The general business judgment is that a company which, after only two months of operations, is producing a finished article of excellent quality and is selling half of its total capacity has made splendid progress.

The majority opinion also states that the field was "preempted" by the existing companies. We have already seen that defendants themselves had no such view of the situation. They felt that the purchasers would welcome a newcomer into the field as some protection against the defendants' monopoly. As Judge Anderson states in his dissenting opinion, "the three old concerns had, since 1914, been relying mainly on their association and agreement to fix prices and therefore had become unprogressive in equip-

ping and operating their plants." The majority entirely overlook the possibilities through making a better paper, through greater efficiency, through stimulating demand for new uses by good marketing methods.

The number of new fields of business opened from year to year is small in proportion to the number of existing lines of business. By far the greater portion of humanity are compelled to enter present fields of endeavor and apply their energy and ingenuity to efficient production and marketing and obtaining a clientele. To assume the doctrine of the majority opinion would render all persons who enter existing vocations subject to the wilful destruction of their competitors.

The thought runs through the majority opinion that, in entering an existing field, a huge fortune must be possessed by a new concern or it must inevitably fail. This is an assumption not borne out by economic experience. It is not true that the company of lesser capital must necessarily fail in competition with the company of greater capital. Every lawyer can immediately think of instances in his own practice where people have entered business with a small capital and by specialization, close supervision, proper attention to details, good service, constant contact with customers, and individual thought, initiative, and leadership, have built up business institutions which have flourished in spite of the competition of large monopolistic companies. Monopolies have often been inefficient and been unable to maintain their proportion of the business as against independent companies. They often work under high capital costs because of moneys expended in ambitious expansion and in killing competitors; they suffer from inefficiency in management, often producing goods of poor quality and failing to make proper improvements; the incentive to individual effort is greatly diminished while at the same time the burdens of management placed upon individuals are greatly magnified. Monopolies have often been able to retain their power only

through price fixing and other violations of law. There is a mortality in business of large as well as small companies. The large are not destined to endure forever, nor the small to perish immediately. The assumption of the majority is an *a priori* conjecture contrary to experience. The majority assume a static, feudal condition of industry, contrary to our economic history, contrary to the spirit of our institutions. It is a doctrine of fatalism, which the people of this country do not accept.

III.

It was a usurpation of the function of the jury for the Court of Appeals to hold as a matter of law that plaintiff's failure was inevitable.

In his dissenting opinion Judge Anderson says: "Indeed, the opinion on damages does not read at all like the opinion of an appellate court, dealing with questions of law; it deals largely with facts solely for the jury" (R. 625).

The rule of law is that, if there is any reasonable basis for a difference of opinion as to the facts, the court should not set aside the finding of the jury. Here there is no antithesis of facts against facts. The facts of the palpable harm done are uncontradicted. But the majority conjecture that the plaintiff would have perished in some other way and give conclusive effect to this supposition against all the evidence. It is an antithesis of mere conjecture against facts. And the court gives no effect to the facts and conclusive effect as a matter of law to its conjecture.

This is, to say the least, a novel principle. It is therefore not surprising that counsel for defendants seek to escape this expressed basis for the decision by suggesting that the real reason is that plaintiff produced no evidence to prove that the defendants would not have reduced prices to the same extent severally, without combination. In this manner defendants' counsel seek to avoid the burden of vin-

dicating the process by which a supposition is transmuted by the court into a conclusive presumption.

In *Wm. H. Rankin Co.* v. *Associated Bill Posters,* 42 Fed. (2d) 152 (C.C.A. 2) (certiorari denied, Oct. 13, 1930, Adv. Ops. U.S. Sup. Ct. L. Ed. Oct. 1930, p. 25), Ramsay was permitted to recover damages for defendants' unlawful acts based on probable future earnings, although he introduced no evidence of probable future earnings and proved only the receipts and expenditures prior to defendants' acts. The court said:

> "Had there been no evidence from which damages could be fixed by the jury, of course this plaintiff could not recover. But there was evidence. The financial history of the Ramsay business was in the case. Perhaps the jury was not as competent to analyze that evidence as some financial and business expert might have been, but it could draw its own reasonable conclusions from it. That is what a jury is to do anyway in arriving at the amount of damages in any case. The jury had the data before it, and was left to determine the damages from that in what may be called its raw state. Perhaps the testimony of someone competent to have estimated the business loss resulting from the defendants' acts would have helped, but it was not indispensable [citing cases]."

The plaintiff is entitled to the benefit of all inferences which may be drawn from its testimony.

In *Eastman Kodak Co.* v. *Southern Photo Materials Co.,* 273 U.S. 359, the plaintiff claimed that the Eastman Company refused in 1910 and thereafter to sell its goods to plaintiff at dealers' discounts. Defendant pointed out that the plaintiff's evidence showed that plaintiff had suffered a net loss in the two years prior to defendant's alleged unlawful action and had made a profit in the year following

such action; that defendant's action followed upon the plaintiff taking over another line of goods in addition to defendant's, and it was a mere assumption that plaintiff could have sold as large a quantity of defendant's goods after taking over such other line. The court held:

> "We conclude that plaintiff's evidence as to the amount of damages, while mainly circumstantial, was competent; and that it sufficiently showed the extent of the damages, as a matter of just and reasonable inference, to warrant the submission of this question to the jury."

Circumstantial evidence plays an important part in the law. One's life or liberty may be taken on the basis of such evidence. Yet the probative value of circumstantial evidence consists wholly of the inferences which may be drawn from it.

In *American Can Co.* v. *Ladoga Canning Co.*, decided October 28, 1930 (C.C.A. 7) (certiorari denied Jan. 13, 1931), the plaintiff recovered damages under the Clayton Act. In sustaining the verdict the Court of Appeals said:

> "It is true plaintiff's proof of damages depends largely upon what is commonly called circumstantial evidence. To a certain extent this is supplemented by inferences deducible from such evidence. But such proof is sufficient to support a recovery of substantial damages."

In the recent case of *Gunning* v. *Cooley*, 281 U.S. 90 (cited by defendants), this Court said:

> "And in determining a motion of either party for a peremptory instruction, the court assumes that the evidence for the opposing party proves all that it reasonably may be found sufficient to establish and that from

> such facts there should be drawn in favor of the latter all the inferences that fairly are deducible from them."

In the case at bar the trial court in its charge to the jury ruled that no recovery could be had for future profits, or for profits on sales which might have been made in the past if there had been no unlawful interference with plaintiff's business. It restricted recovery to the palpable, visible damages to property suffered by plaintiff as a result of defendants' acts: the diminution in value of its plant and the loss on sales actually made. No future, prospective element is involved in the verdict for the plaintiff. It is the defendants' claim which is conjectural, for they conjecture as to what might have happened in the future under suppositious conditions contrary to fact. They go further. Not merely do they seek to give to conjectures the weight of facts, but maintain that, in the absence of testimony of conjectures, their suggested *a priori* conjecture is to be given the weight and effect of a conclusive presumption of law.

The question whether defendants' act proximately caused or contributed to plaintiff's injury is likewise primarily a question of fact for the jury. Only when the jury's verdict is plainly arbitrary, only when there is no possible room for difference of opinion, can its verdict be set aside. The classic statement of this principle is found in *Milwaukee &c. Ry. Co.* v. *Kellogg,* 94 U.S. 469:

> "The true rule is, that what is the proximate cause of an injury is ordinarily a question for the jury. It is not a question of science or of legal knowledge. It is to be determined as a fact, in view of the circumstances of fact attending it."

In *Reeve* v. *Dennett,* 145 Mass. 23, defendant induced plaintiff to purchase stock in a company being formed in May, 1880. Plaintiff became a director of the company and in April, 1881, after he had been a director for almost a year,

purchased additional stock. In seeking recovery from defendant for fraudulent representations made in May, 1880, he claimed as an element of damages the loss suffered from the purchase in April, 1881. The trial court permitted such claim, and after verdict and judgment for plaintiff, defendant appealed, claiming that after plaintiff had been a director for almost a year, a purchase of stock by him must have been based upon his own means of knowledge, and not upon a representation made by some one a year previously, before the company was formed. It did not require much dogmatism to so hold. Yet the court upheld the verdict. We read in the opinion:

> "We cannot say, as matter of law, that such representations may not have continued to operate on the plaintiff's mind in April, 1881 and may not have induced him to accept more stock. We cannot say so, as matter of law, even if the plaintiff had become a director and had acquired independent means of knowledge in the meantime, if in fact he continued to rely upon the defendant's statement in dealing with him."

IV.

There was sufficient evidence to go to the jury that the defendants' concerted price reductions were the proximate cause of the plaintiff's failure.

(1) It is a general principle that an intended consequence of an act is proximate. We have seen that the defendants pursued their concerted action with the intent to injure and destroy plaintiff (*supra*, Point I).

Professor McLaughlin in an article on proximate cause (39 Harvard Law Review, 151) says: "It is generally agreed that results intended by an actor are proximate if they in fact take place." Jeremiah Smith (25 Harvard Law Review, 228) said that "all legal writers who have

considered the question" hold persons liable for intended consequences. Edgerton in his articles on Legal Cause says (72 U. of Pa. L.R. 358-359):

> "If the defendant intended to produce the very result which he succeeded in producing, it is clear and familiar that he is a legal cause of the result, however remote and remarkable the result may be; for the reason, evidently, that this seems just. . . .
>
> "Acts which are intended to cause harm tend to produce it; the social interest in discouraging them is therefore evident."

In Pollock on Torts (13th ed.), 344, we read:

> "It does not lie in a man's mouth to say that the consequence which he deliberately planned and procured is too remote for the law to treat as a consequence."

In *Quinn* v. *Leathem*, [1901] A.C. 495, Lord Lindley said: "The intention to injure the plaintiff negatives all excuses and disposes of any question of remoteness of damage." See 1 Street, Foundations of Legal Liability, 11, 489, to the same effect.

(2) Another principle of proximate cause is that of liability for foreseeable consequences. Of course the consequences of the defendants' acts were not only foreseeable, but foreseen, and there is clear liability on this ground.

(3) The damage caused by the conspirators acting in violation of the Sherman Act cannot be excused on the conjecture, which is contrary to fact, that similar damage might have been caused by independent action of the conspirators or might have occurred in some other manner.

Professor Beale (33 Harvard Law Review, 638) says: "The question is not what would have happened, but what did happen." Dean Green, writing on Causation in 77 U. of

Pa. L.R. 605, points out that an inquiry as to what would have happened in the absence of defendant's acts "is vicious from two aspects: (1) it presents an inquiry impossible of determination; the case is not what might have happened but what has happened; (2) the inquiry while stated in what seems to be terms of cause is in fact whether the defendant should be held responsible." McLaughlin points out (39 Harvard Law Review, 152):

> "It is fundamental that, as far as causation is concerned, it is necessary for liability only that defendant's act be *a* proximate cause of the damage, but confusion is frequently facilitated by the assumption that it must be *the* proximate cause."

In *Mammoth Oil Co.* v. *United States*, 275 U.S. 13, the court did not deem it proper to consider whether the lease and agreement were advantageous to the government, whether they might or would have been made irrespective of collusion; it was sufficient that collusion and conspiracy were factors in the making of the lease. A man who kills another is not excused by assertions that some one else would have killed the victim if he had not done so.

The law must be and is practical with reference to the problem of causation. It deals with the immediate cause, the immediate wrong-doer, rather than with metaphysical speculations as to remote causes. In Bacon's Maxims, 1, the following principle is laid down:

> "In juri non remota causa sed proxima spectatur. It were infinite for the law to judge the cause of causes, and their impulsions one of another; therefore it contenteth it selfe with the immediate cause, and judgeth of acts by that, without looking to any further degree."

This principle has been dominant in the attitude of the law on the question of causation. In *Hale* v. *Hatch & North*

Coal Co., 204 Fed. 433 (C.C.A. 2), the plaintiff, who was a coal dealer, had underbid other dealers in getting a contract from the city. He could not afterwards obtain coal from the wholesalers, and his business failed. In reversing a judgment for defendant the Court of Appeals said:

> "In looking for the causes responsible for Hale's ruin we naturally turn to those persons who were being injured by his success."

(4) There can be no doubt that the concerted, intensive price cutting of the defendants caused the plaintiff's failure. Certainly there was evidence upon which the jury had the right to make such a finding. Indeed, even the majority opinion recognizes the causative relation between price cutting of the defendants and the failure of the plaintiff, because it goes so far as to maintain that individual price cutting practised by the defendants severally would have been sufficient to put the plaintiff out of business. There is no difference between the majority and the minority opinion as to the effectiveness of price cutting. The difference is only in the assumption by the majority that the causation is not proximate if the harm might have been caused in other ways. But the defendants created the conditions of an illegal combination. They are not in a position to ask to be excused from the consequences of their acts by conjectures as to what might have happened under normal, competitive conditions. They seek to be excused by assumptions of what would have happened if conditions were normal; they have rendered it impossible to make such determination because they have by their own acts created abnormal conditions.

What injured and destroyed the plaintiff was the concerted price cutting. The law cannot split up the action of the defendants into parts and say that the price cutting without the combination was the cause and the combination superfluous. The direct effects of the acts of the defendants

as they planned and committed them are attributable to them. That is sound and just. It makes a party liable only for what he does.

In the Yale Law Journal, May, 1930, there is a discussion of the decision of the Court of Appeals at pages 1035-1042. The article disagrees with the decision of the court. With reference to the problem of causation it says: "In the instant case the defendants conspired to drive the plaintiff out of business. Business failure followed in the course of a few months. That the conspiracy was a moving factor in bringing about this failure seems at least a fair assumption." The decision of the Court of Appeals in this cause was also discussed in the Harvard Law Review, May, 1930, page 1165, with reference to the problem of causation. The article reached the conclusion that the decision was unsound, saying, "the deterrent effect of the statute is weakened if the results accomplished by the defendants' unlawful combination are excused because they could have been attained in a lawful manner."

V.

There was sufficient evidence of damage to warrant a verdict for the plaintiff.

(1) The defendants confuse the requirement of reasonable certainty as to the fact of damage with certainty as to the amount. There are numerous cases where there is considerable difficulty in determining the amount of damage. Damages may be recovered by the next of kin for the death of an infant, although it is difficult to estimate the financial loss suffered by a parent who would have had the legal burden of maintaining the child for many years to come. Although the amount of pecuniary damage is very uncertain, the law allows recovery for breach of a contract to form a partnership. See *Hyer* v. *Richman Traction Co.*, 168 U.S. 471, 483 (cited in our original brief at p. 32). Damages may

be recovered for breach of a contract to share the profits of a business, for breach of promise of marriage, for injury to business reputation, although in all these cases the calculation of the actual damage is not governed by rules of thumb. A builder may recover for the breach by the owner of a contract for the construction of particular works although there is manifestly some uncertainty as to whether the builder would have been able to complete the work and what the ultimate profit would have been. In determining the value of land, numerous complicated factors must be taken into consideration. In patent, copyright, and trade-mark cases, in cases of valuation for rate purposes, in cases of unfair competition, there are very difficult questions of damage or value to be solved.

In Sutherland on Damages (4th ed.), sec. 70, relating to damages for tortious interference with business, the author quotes the well-known language of Christiancy, J., in *Allison* v. *Chandler*, 11 Mich. 542, as being the statement of the correct rule upon the subject. This statement has been frequently quoted in opinion and treatise:

> "The nature of the case is such that the wrong-doer has chosen to make it; and upon every principle of justice, *he* is the party who should be made to sustain all the risk of loss which may arise from the uncertainty pertaining to the nature of the case, and the difficulty of accurately estimating the results of his own wrongful act. Upon what principle of right can courts of justice assume—not simply to divide this risk, which would be thus far unjust—but to relieve the wrong-doer from it entirely, and throw the *whole* upon the innocent and injured party? . . .
>
> "Since, from the nature of the case, the damages cannot be estimated with certainty, and there is a risk of giving by one course of trial less, and by the other more than a fair compensation—to say nothing of jus-

tice—does not sound policy require that the risk should be thrown upon the wrong-doer instead of the injured party? However this question may be answered, we can not resist the conclusion that it is better to run a slight risk of giving somewhat more than actual compensation, than to adopt a rule which, under the circumstances of the case, will, in all reasonable probability, preclude the injured party from the recovery of a large proportion of the damages he has actually sustained from the injury, though the amount thus excluded can not be estimated with accuracy by a fixed and certain rule. Certainty is doubtless very desirable in estimating damages in all cases; and where, from the nature and circumstances of the case, a rule can be discovered by which adequate compensation can be accurately measured, the rule should be applied in actions of tort, as well as in those upon contract. . . .

"But shall the injured party in an action of tort, which may happen to furnish no element of certainty, be allowed to recover no damages (or merely nominal), because he can not show the exact amount with certainty, though he is ready to show, to the satisfaction of the jury, that he has suffered large damages by the injury? Certainty, it is true, would thus be attained; but it would be the certainty of injustice. And, though a rule of certainty may be found which will measure *a portion* and *only a portion* of the damages, and exclude a very material portion, which it can be rendered morally certain the injured party has sustained, though its exact amount can not be measured by a fixed rule; here to apply any such rule to the whole case, is to misapply it; and so far as it excludes all damages which can not be measured by it, it perpetrates positive injustice under the pretense of administering justice.

"The law does not require impossibilities; and can not, therefore, require a higher degree of certainty than

the nature of the case admits. And we can see no good reason for requiring any higher degree of certainty in respect to the amount of damages, than in respect to any other branch of the cause. Juries are allowed to act upon probable and inferential, as well as direct and positive proof. And when, from the nature of the case, the amount of the damages can not be estimated with certainty, or only a part of them can be so estimated, we can see no objection to placing before the jury all the facts and circumstances of the case, having any tendency to show damages, or their probable amount; so as to enable them to make the most intelligible and probable estimate which the nature of the case will permit."

(2) There was clearly a diminution in value of the plaintiff's property as a result of the defendants' acts. The defendants' concerted action made the continuance of the operations of the plant impossible. Such enforced suspension entitles the plaintiff to damages for the diminution in value thereby entailed. In *United Mine Workers* v. *Coronado Coal Co.*, 258 Fed. 829 (C.C.A. 8), it was held that, where the plaintiff closed certain mines to avoid further trouble, the value of the leases thus forfeited was clearly a part of the damage sustained. On appeal to the Supreme Court the case was reversed on jurisdictional grounds only. In *New England Cement Gun Co.* v. *McGivern*, 218 Mass. 198, an owner, as the result of action of a trade union, requested cancellation of the plaintiff's contract to do plastering, and the plaintiff assented to the cancellation. It was held that the plaintiff could recover the damage caused by the acts of the defendant, and in fixing such damages it could be taken into account that as a practical matter it was impossible for the plaintiff to hold its contract and the defendant's action amounted to a destruction of its value. In *Rogers* v. *Mechanics' Insurance Co.*, 1 Story, 603; Fed. Cas. No. 12,017, Judge Story said:

"Suppose that fruit is insured, and the vessel has a long passage, in which, by ordinary waste and decay, it must suffer some deterioration, and then a storm occurs, in which it suffers other positive damage and injury, or there is a jettison thereof; how are we to ascertain what diminution is to be attributed to natural waste and decay and what to the perils of the seas? or what was its true value at the time of the jettison? There can be no positive and absolute certainty. The most that can be done, is to ascertain, by the exercise of a sound judgment, what, under all the circumstances, may reasonably be attributed to one cause, and what to the other."

In *Mark* v. *Hudson River Bridge Co.*, 103 N.Y. 28, the evidence did not distinguish between expenditures for repairs and improvements, but recovery was permitted. In *Burchardt* v. *Burchardt*, 42 Oh. St. 474, the court held that it was competent for a witness to give an opinion as to the value of property with and without good-will and trademark, or the diminished value of the property with good-will destroyed or impaired by reason of the wrongful acts of the defendant, and that such testimony could be taken as the measure of damages.

If the defendants did nothing more than to accelerate the end of plaintiff, the jury would be entitled to fix the damages for such acceleration and to determine the value in its opinion of the expectancy of the plaintiff. In *Ware-Kramer Tobacco Co.* v. *American Tobacco Co.*, 180 Fed. 160 (C.C. N.C.) (writ of error dismissed, 196 Fed. 1004 (C.C.A. 4)), the court met an objection similar to that of the defendants in the case at bar, pointing out as elements of damage that the business was destroyed and the property in the hands of a trustee in bankruptcy. The court said:

"It requires no argument to show that the course of conduct pursued by defendants towards the Ware-

> Kramer Tobacco Company from the moment its projectors conceived the idea of bringing it into corporate existence, through its struggle to take upon itself the form and features of organic life, and while, in defiance of the efforts of defendants to throttle its activities, it maintained an existence with promise of success, were calculated and intended not only to restrain but to destroy it."

This language exactly describes the action of the defendants in the case at bar.

(3) We have referred in our original brief (p. 19) to leading cases justifying recovery for the diminution in revenue of the plaintiff on the sales actually made, through being compelled, in order to carry on business, to sell at the reduced prices which the combination fixed. The court on this point instructed the jury that no recovery could be had unless it found that the price prevailing before the reductions by the combination was a reasonable price. We have referred to cases, including decisions of this Court, where the jury was permitted to determine a reasonable price in order to fix the damage between that price and a price which the plaintiff had to *pay*. There is no difference in principle when the jury has to determine the difference between that price and the price for which the plaintiff had to *sell*. The money received is as definite in the latter case as the money expended in the former. The determination of the reasonable price is no more difficult in the one case than the other.

Counsel for defendants, however, argue that it was incumbent upon the plaintiff to introduce specific evidence as to what the price would have been if the defendants had not reduced it.

It is not incumbent upon a plaintiff in an action for damages to introduce evidence of conclusions derived from facts. When the facts are introduced the inferences and conclusions may be drawn by the jury. As the defendants

conspired to reduce prices by concerted action, their conduct permits the inference that those prices would not have been reduced except by such action. The determination in detail of precisely what would have happened under normal conditions is not free from difficulty, but the difficulty was created by the defendants' own conduct in substituting abnormal, unlawful conditions for normal conditions. In Sedgwick on Damages (4th ed.), vol. 1, sec. 178, we read: ". . . where the defendant has by his own wrong put it out of the plaintiff's power to prove the quantum of damages exactly, the presumption is against the defendant, and the burden is upon him to reduce the amount from the greatest possible amount."

Compare the doctrine laid down by this Court in patent infringement cases, for the proof of profits where the alleged infringing patent is combined by the defendant with other elements.

> *Westinghouse Elec. & Mfg. Co.* v. *Wagner Elec. & Mfg. Co.*, 225 U.S. 604.

In *Straus* v. *Victor Talking Machine Co.* (cited in our original brief, 19) the plaintiff recovered damages suffered because of paying higher prices than that it claimed it would have had to pay if the defendants' policy did not prevent purchases from distributors. The defendants introduced testimony of distributors who stated that they would not have sold to the plaintiff because it was engaged in cut-price competition. Defendants maintained that plaintiff had failed to show that it would have been able to purchase from distributors at the discounted price if defendants had not been guilty of violating the law. The court said:

> "They [defendants] insist that the jury was left to speculation because some distributors testified that they would not have sold Macy's, and because plaintiff engaged in a cut price competition with other retailers,

> and they argue, in effect, that plaintiffs did not sustain what may be characterized as the metaphysical burden of showing that they could have purchased in a free market the same amount of goods at the customary list prices less discounts. If there is speculation, it is that indulged by defendants. . . .
>
> *"What the distributors would have done, if free and unhampered, is truly a matter of speculation."*

An interesting parallel is presented when a party sues for breach of a contract requiring the performance of a series of acts on his part over a considerable period of time. He is entitled to recover if he has performed up to the time of the breach and appears ready to proceed, and as this Court said in the oft-cited case of *Angle* v. *Chicago &c. R. Co.*, 151 U.S. 1: "It is not an answer to say that there was no certainty that the contractor would have completed his contract. . . . It certainly does not lie in the mouth of a wrongdoer, in the face of such probabilities as attend this case, to say perhaps the contract would not have been completed even if no interference had been had, and that, therefore, there being no certainty of the loss, there is no liability."

In Sutherland on Damages, sec. 120, it is stated with reference to the right of a contractor to recover under such conditions:

> "He is entitled to recover the profits which he would have made—the contract price less what he would have to do or expend to earn or otherwise entitle himself to it. This deduction may be the price of labor or the value of property at a future day. The action for damages recoverable for such a breach may be brought and tried before that day arrives. If so, the prices prevailing at the time of the breach may be acted upon as the test of values at the times mentioned in the contract. . . ."

In the recent case of *American Can Co.* v. *Ladoga Canning Co.*, decided October 28, 1930 (C.C.A. 7) (certiorari denied, Jan. 13, 1931), an action for damages for violation of the Clayton Act, the Court of Appeals, in affirming judgment for plaintiff, said:

> "The case is one for the application of the rule which denies defendant's right to take refuge behind the alleged uncertainty or indefiniteness of the plaintiff's proof of damages which were occasioned by defendant's own wrongdoing and its concealment of such fact from the injured party."

(4) The cases cited by defendants and the cases relied upon by the court below do not justify the result contended for.

In *Keogh* v. *Chicago & Northwestern Railway,* 260 U.S. 156, there was no damage suffered by the plaintiff, because the rate he paid was a legal rate approved by the Interstate Commerce Commission. The court pointed out that, "unless and until suspended or set aside, this rate is made for all purposes, the legal rate as between carrier and shipper." The court pointed out: "If the conspiracy here complained of had resulted in rates which the Commission found to be illegal because unreasonably high or discriminatory, the full amount of the damages sustained, whatever their nature, would have been recoverable in such proceedings." There was no damage, because the plaintiff paid the fair, reasonable, legal rate.

If the damage is certain, the fact that the extent is uncertain does not prevent recovery. But if it is clear that there is no damage, of course there is no recovery. The Keogh case is one where it was clear that there was no damage.

There is an interesting analysis in Yale Law Journal, May, 1930, 1035-1042, of this and other cases relied on by defendants. It is there pointed out that, while the courts take care lest a conspiracy and restraint of trade be fol-

lowed by fictitious damage suits, it is at the same time clear from the holdings of the courts that an award of damages should be made if an injury has in fact occurred. The courts have sometimes ordered a new trial because it appeared that the plaintiff was withholding proof within his power.

Thus in *American Sea Green Slate Co.* v. *O'Halloran,* 229 Fed. 77, the plaintiff was in fact making a larger profit after the defendant's illegal sales agreement than before. The plaintiff sued on the theory that he was compelled to pay a higher price than the market price; but the evidence of the price paid by him related only to certain special sizes and qualities greatly in demand, which he purchased; and he gave no evidence of the market price as to these sizes and qualities, showing only the price which the defendant paid to its own producers for the purchase of an entire output containing sizes and qualities slow of sale as well as good sizes. He claimed future loss of profits because of three customers who previously purchased from him and now did not, but there was no evidence that these persons were buying slate from anybody. This claim of damages was for prospective profits, and in the case at bar the plaintiff's damages do not include any element of prospective profit.

Jack v. *Armour,* 291 Fed. 741, was merely a case where a demurrer was sustained to a declaration because there was no allegation in the declaration of what injury occurred.

In *Central Coal & Coke Co.* v. *Hartman,* 111 Fed. 96, a coal dealer sued for loss of future profits because certain dealers demanded a price higher than the wholesale price from the plaintiff. The plaintiff produced no facts, no data, no evidence of the decrease in his business nor of the volume of his general business, nothing about the income or expenses before or after the defendant's acts. He gave merely the difference between the cost and selling price as profit,

without data as to expenses. The court said that there were no data for a rational estimate of any kind, and throughout the opinion indicated that, had the plaintiff really been injured, some facts would have been submitted in evidence.

In *Chicago Life Insurance Co.* v. *Tiernan,* 263 Fed. 325, a judgment for the plaintiff was reversed because the plaintiff had breached a condition of his contract in entering the insurance business for another company, and was not entitled to recover.

In *McCormick* v. *U.S. Mining Co.,* 185 Fed. 748, the defendant enjoined a mining company from operating a mine, and filed a bond. The injunction was dissolved and an action was brought by the mining company on the bond. The company's claim was for lost profits and its computation was based entirely on the hypothesis of extracting not less than 100 pounds daily for each day. Yet during the period of years prior to the injunction it had only mined a total of between 500 and 1000 tons in all from the mine in question. Furthermore, the case is one involving the ownership of a limited quantity of raw material, which was still owned and could be sold. There was no evidence which would permit a determination of whether any loss was suffered through depreciation in price. The company gave no evidence of any profits made on the operations of its other mines. The Court of Appeals sent the case back to the trial court for a new trial, with directions as to how damages should be proved.

Sussex Land & Live Stock Co. v. *Midwest Refining Co.,* 276 Fed. 932, is a *nisi prius* trial in which the opinion gives the findings of fact and law of the trial court in an equity suit.

Keystone Manufacturing Co. v. *Adams,* 151 U.S. 139, was a suit for patent infringement in which the plaintiff sought to recover, not a license fee, but the defendant's profits; and it was held that his case was based upon the profits actually made by defendant.

It is to be noted that most of these cases were claims for prospective profits—a question not involved in the case at bar.

In the case at bar the plaintiff produced full and complete evidence of all matters pertaining to its business, its customers, its sales, cost of materials, expenses; and the defendant produced no testimony. The statement of this Court in *Mammoth Oil Co.* v. *United States*, 275 U.S. 13, is applicable:

> "As said by Lord Mansfield in Blatch v. Archer (Cowper 63, 65): 'It is certainly a maxim that all evidence is to be weighed according to the proof which it was in the power of one side to have produced, and in the power of the other to have contradicted.' "

In this case the court also pointed out that, from the failure of defendants to offer evidence of facts within their knowledge or power, it may justly be inferred that they were not in a position to combat or explain away any facts or circumstances shown by plaintiff's evidence and material to its case.

(5) In *Paramount Famous Lasky Corp.* v. *United States*, decided by this Court November 24, 1930, this Court said:

> "The fundamental purpose of the Sherman Act was to secure equality of opportunity to protect the public against evils commonly incident to destruction of competition through monopolies and combinations in restraint of trade. Ramsay Co. v. Bill Posters Assn., 260 U. S. 501, 512."

It is essential, in order to preserve this equality of opportunity, that a newly organized concern have the protection of the Act as well as an old established one. Equality of opportunity means the opportunity to begin as well as to finish.

In *United States* v. *Patterson*, 59 Fed. 280 (C.C. Mass.), the court said that "neither the letter of the statute nor its purpose distinguishes between strangling a commerce which has been born and preventing the birth of a commerce which does not exist."

In *Thompsen* v. *Union Castle Mail S.S. Co.*, 166 Fed. 251 (C.C.A. 2), which was an action for damages under the Anti-Trust Act against steamship companies, the court said:

> "It is as unlawful to prevent a person from engaging in business as it is to drive a person out of business."

American Banana Co. v. *United Fruit Co.*, 166 Fed. 261 (C.C.A. 2), is to the same effect.

It is more difficult to evaluate the precise amount of damage when the combination masses its power to destroy a concern which is newly formed than when it asserts its force against a concern with an old history. But the law has been clear that, if the fact of damage is shown, mere difficulty of ascertainment should not prevent redress of injury. The courts have never denied recovery of damage for destruction of a growing crop because of doubts as to whether it would have ripened to maturity. When the purpose of the Sherman Act to give redress for injury is so clear, it would be strange, indeed, that stricter rules should be applied to the recovery of damages than have generally been applied in the development of the common law.

The policy of the Sherman Act is a general one; there have been similar provisions in the Tariff Act for over a generation; the general policy was extended by the Clayton Act.

We have found only three discussions in law reviews of the decision of the Court of Appeals in the case at bar. We have already referred to the article in Harvard Law Review

(*supra*, p. 19), pointing out the unsoundness of the decision and how it weakens the deterrent effect of the Sherman Act. In the extensive article in the May, 1930, number of Yale Law Journal (to which we have referred, *supra*, p. 19), it was stated that the decision is wrong in principle, because it, in effect, denies the protection of the Sherman Act to newly established concerns; and also wrong on the basis of precedent, the court having "gone well beyond the decisions on which it relies." In a discussion of this case in the June, 1930, number of the Tulane Law Review it was said:

> "The majority of the court was of the opinion that the plaintiff's proof of damages was speculative and denied recovery on that ground. The cases relied on to support this position, it is submitted, are inapplicable. . . . It seems also, that the view of the majority operates to set up a standard of proof which would deprive the Sherman and Clayton Acts of a large measure of usefulness in this connection in a very large number of cases. It is submitted, therefore, that the conclusion of the minority in the instant case is better supported by principle and authority."

The Sherman Act should receive an interpretation and application which truly express the dominant purpose that led to its enactment. Economic conditions today require such application. From the standpoints of principle, precedent, and social welfare, the verdict for plaintiff should stand.

VI.

The trial court and the majority as well as the minority of the Court of Appeals concurred that there was sufficient evidence to go to the jury of concerted action by the defendants to fix prices to prevent the plaintiff from acquiring trade; and such concurrent holdings were clearly correct.

(1) Counsel for defendants now argue in this Court that there was not sufficient evidence to go to the jury on the issue of a combination in restraint of trade or to monopolize. The trial court and the majority as well as the minority of the Court of Appeals concurred in holding that there was sufficient evidence of a combination (Brief, *supra*, p. 1).

(2) There can be no doubt that the record amply demonstrates concerted action by the defendants in reducing prices in order to prevent the plaintiff from acquiring trade. The import of the defendants' argument on this question is that there is no positive proof of an agreement between them to reduce prices. But in seeking to ascertain whether there is concerted action or a conspiracy in committing a tort, we do not seek for the elements of a bilateral or multilateral contract. It is not necessary that the defendants bind themselves to fix prices. It is enough that there is concerted action, that they act together in pursuance of a common object. In *American Column & Lumber Co.* v. *United States*, 257 U.S. 377, the rule was laid down "that any concerted action by any combination of men or corporations to cause, or which in fact does cause, direct and undue restraint of competition in such commerce, falls within the condemnation of the Act and is unlawful." The court condemned activities whose purpose "was to procure 'harmonious' individual action" among a number of dealers with respect to prices "without having any specific agreement with respect to them." In *Thomsen* v. *Cayser*, 243 U.S. 66, it was contended that there was no proof of an agreement by the defendant steamship lines as to prices. The principal evidence con-

sisted of circulars issued by them. This court said: "It cannot be assumed that the circulars that were issued and the concerted course of dealing under them were the accidents of particular occasions having no premeditation or subsequent unity in execution." In *Eastern States Lumber Association* v. *United States*, 234 U.S. 600, this court said, in affirming a decree holding defendants an illegal combination:

> "True it is that there is no agreement among the retailers to refrain from dealing with listed wholesalers, nor is there any penalty annexed for the failure so to do, but he is blind indeed who does not see the purpose in the predetermined and periodical circulation of this report to put the ban upon wholesale dealers whose names appear in the list of unfair dealers trying by methods obnoxious to the retail dealers to supply the trade which they regard as their own. . . .
>
> "It is said that in order to show a combination or conspiracy within the Sherman Act some agreement must be shown under which the concerted action is taken. It is elementary, however, that conspiracies are seldom capable of proof by direct testimony and may be inferred from the things actually done . . ."

In *Hale* v. *Hatch & North Coal Co.*, 204 Fed. 433, the court said:

> "Conspirators . . . do not advertise their purpose openly, their methods are secret, sinister and clandestine. It is rare, indeed, that a conspiracy is proved by direct evidence. In a vast majority of cases circumstantial evidence is relied on. Such evidence is as efficacious as direct if it establishes the proposition that the defendants, or some of them, had a common purpose to violate the law which they succeeded in accomplishing."

In *Commonwealth* v. *Smith*, 163 Mass. 411, we read as follows:

> "A conspiracy may be proved by circumstantial evidence, and this is the usual mode of proving it, since it is not often that direct evidence can be had. . . . The acts of different persons who are shown to have known each other, or to have been in communication with each other, directed towards the accomplishment of the same object, especially if by the same means or in the same manner, may be satisfactory proof of a conspiracy."

See also *Reg.* v. *Murphy*, 8 C. & P. 397.

That the conspirators' price reductions were identical in amounts and either precisely or practically simultaneous on each occasion is beyond contradiction. It is in effect conceded in the defendants' brief, "Summary of Reductions by any Defendant," pp. 16-18. This appears at a glance if the items in the defendants' summary are bracketed as follows:

(*b*) and (*c*), reduction of ½¢ a pound on rolls.
(*d*), (*e*), and (*f*), reduction of 1¢ a pound on all products.
(*g*), (*h*), and (*i*), discount of 2½¢ to certain packers (actually to so-called "big packers").
(*j*), (*k*), and (*l*), discount of 5% to big packers.
(*m*), (*n*), and (*o*), reduction of 1¢ a pound on all products.
(*p*), (*q*), and (*r*), reduction of 6¢ a thousand on printing of small butter wrappers.

While the simultaneity and identity of the reductions is thus conceded, the defendants' brief with respect to each item (*a*) to (*r*) claims that it was "without concurrent or prior agreement" with the two other alleged conspirators.

In our brief in the Circuit Court of Appeals we presented a minute analysis of the evidence covering the entire period,

demonstrating with respect to each price reduction of the defendants that it was immediately preceded by communications—either at meetings or by telephone—and that, while the defendants and Moyer sturdily claimed that there was no agreement, the circumstances surrounding the reductions (particularly taken in connection with the contradictions, lack of memory, and obvious want of frankness on the part of the witnesses) gave ample indication that the parties had in fact agreed.

While a mere summary of the evidence is convincing, it is only by a minute analysis that the evidence takes on a positive and incontrovertible aspect. It would make this brief too long to analyze the testimony throughout as we did for the court below, but, in view of the claims in the defendants' brief, we shall here submit (*a*) a brief summary of the evidence which established the communications preceding price reductions, and then (*b*) a minute analysis of two of the price reductions, as examples of all.

(A) *Brief Summary of Evidence of Concerted Action on Price Reductions.*

The Story Parchment Company was organized in 1927. It began to take orders about October 10, 1927, and to produce on orders in the latter part of November of that year (Goldmann, R. 547).

It was not invited to join the Parchment Association (Leonhard, R. 474; Goldmann, R. 553).

Representatives of the defendants and West Carrollton continued to meet and to communicate with each other by letter and by telephone.

1. *On November 18, 1927,* Paterson's telephone bill shows a long-distance call to Kalamazoo (R. 516).

On that day Cashmore authorized Cox, Paterson's salesman in Chicago, to eliminate the ½ cent differential in the price of "jumbo" rolls on a sale to Hollis & Duncan to meet a price by Story (P-18, R. 136; P-20, R. 139).

2. *On December 1, 1927,* Cashmore, Southon, and Moyer met in Cincinnati (Southon, R. 527; Cashmore, R. 492).

On December 5, 1927, Paterson announced a reduction in the price of "Jumbo" rolls through elimination of a differential of ½ cent a pound (P-328, P-23, R. 164; P-424).

By letter dated December 2, 1927, from Southon to Greenlee, Kalamazoo's salesman in Chicago, acknowledged by Greenlee on December 6, 1927, and, inferentially, not received by him until the 5th, Kalamazoo made the same price change (K-153, R. 161; K-154, R. 168).

Moyer testified that West Carrollton "might have met that differential, but not as a general thing. They did not broadcast it to their jobbers, and did not publish any change in their price list" (Moyer, R. 539).

It may be noted that Southon's instructions to Greenlee were not "to broadcast the fact that we have eliminated this differential in rolls" (K-153, R. 161).

3. *On December 17, 1927,* Southon telephoned to Cashmore and Moyer (Southon, R. 529; Cashmore, R. 512; P-299, R. 193) on the subject of a proposed reduction in the price of 1 cent a pound.

On January 2, 1928, the defendants and West Carrollton announced to the trade a reduction in basic prices of 1 cent a pound (P-11*a*, P-12, P-13, K-359, K-360, W-109, R. 197-200).

4. *On February 10, 1928,* Southon called Moyer on the telephone (Moyer, R. 541) and said Kalamazoo "was going to meet Story's 2½% by a reduction of that amount."

On the same day Kindleberger wrote Greenlee "to meet this 2½% trade discount to the big six or seven Packers, also to the Institute, to Barber and to the Allied" (K-76, R. 280).

Moyer phoned Moody to make the reduction "to the big packers in Chicago" (Moyer, R. 541).

Cashmore arrived in Chicago on February 11th, and on that day authorized the 2½% discount "to any customers

that demanded it, having reference to Story's" (Cashmore, R. 491).

5. *On February 23, 1928*, Cashmore, Moyer, Southon, Kindleberger, and Dohan met in New York City (Southon, R. 531; Cashmore, R. 513).

On February 24th Cashmore telegraphed Cox: ". . . No change authorized except to meet Story's competition on all large business" (P-309, R. 322).

On February 27th West Carrollton (W-53, R. 327) and on February 28th Kalamazoo (K-116, R. 329) advised their salesmen to substantially the same effect.

On February 29, 1928, all three companions authorized a discount of 5% to the big packers (P-57, R. 334; W-58, R. 337; P-325, R. 337; P-333, R. 339; Kindleberger, R. 526; Southon, R. 535; Moyer, R. 541).

6. *On the evening of March 8, 1928*, Southon telephoned to Cashmore and Moyer (Cashmore, R. 479; Moyer, R. 452; Southon, R. 536) and told them that Kalamazoo was going to announce a reduction of 1 cent a pound.

On March 9, 1928, all three companies announced a reduction of 1 cent a pound, and new discounts on circles, identical for all three companies (W-146, R. 357; K-143, R. 358; W-111, R. 359; P-6 and P-8, referred to at R. 360; Cashmore, R. 479).

7. *On March 31, 1928*, Dohan, Cashmore, Southon, and Moyer met at the Morrison Hotel in Chicago (Moyer, R. 543; Cashmore, R. 480).

Story was mentioned, but apparently it was agreed that no change in policy should then be made.

8. *On May 14, 1928*, Cashmore, Southon, and Moyer met at the Hotel McAlpin in New York City (Cashmore, R. 480; Southon, R. 534; Moyer, R. 544).

Paterson, on May 15 or 16, 1928 (Cashmore, R. 480), announced a reduction in printing prices for sizes up to and including 63 square inches of one third the former price,

effective May 14th, and on May 24th issued a bulletin of such prices (P-10, not printed).

Kalamazoo at about the same time announced an identical reduction effective May 15th (Cashmore, R. 480; K-331, not printed).

West Carrollton on May 17, 1928, sent out notice of an identical reduction (Moyer, R. 544), and on May 21st its price bulletin (W-113, R. 459). Its effective date does not appear.

The unanimity of action by the defendants and West Carrollton on so many separate occasions, preceded by communications between them, and without any consideration of the nature of those communications, is sufficient of itself, we believe, to warrant an inference that there was an understanding or agreement between them or intentional concerted action.

(B) *Analysis of Evidence Showing Concerted Action in Reduction of 1 Cent a Pound in Basic Price on January 2, 1928.*

On January 2, 1928, all three members of the "Parchment Association" reduced their basic price 1 cent a pound.

That this be done by concerted action seems first to have been suggested at a meeting of representatives of the three associated parchment manufacturers, Cashmore of Paterson, Southon of Kalamazoo, and Moyer of West Carrollton, in Cincinnati on December 1st.

Cashmore, interrogated as to the genesis of the Cincinnati meeting, testified that "Southon had asked [him] if he was coming out in that direction, and that he had many things that he would like to discuss. . . . Witness did not know how Moyer got word. . . . His presence there was not exactly a surprise to him. He [Moyer] usually met witness when Southon did" (R. 483). And again he testified that Southon telephoned him at Passaic saying there were some matters "that we should talk about, let us get to-

gether" and that "He intimated that they had some information in reference to Story's arrangements with the exchange [sic]" (R. 492).

Southon, on the other hand, while he could not remember who called the December meeting, "hardly thinks he did." He did not remember calling up Cashmore and asking if he was "coming out in this direction" or telling him "that he had many things he would like to discuss." His memory on that incident is a blank (Southon, R. 528).

The idea had originated apparently with Kindleberger of Kalamazoo. Cashmore testified that at the Cincinnati meeting—

> "He [Southon] had been talking about Story and Story's offerings, and he thought Kindleberger was expecting to drop a cent a pound as usual,* something to that order the first of the year" (R. 483).

Moyer denied this, and Southon denied any memory of it (Moyer, R. 540; Southon, R. 528). The other evidence, however, tends to support Cashmore.

Southon testified that Kindleberger had started figuring on new price lists in November and had finished his job by December 5th (R. 530).

On December 12th Greenlee (Kalamazoo's Chicago salesman) wrote Kindleberger (K-21, R. 183, at 185):

> "Possibly you are not looking for suggestions, but if it isn't out of order, I would like to suggest that we keep it strictly among ourselves, so that no one will have an inkling that we know about what is to transpire on January 15th; then, say on January 10th, you come out with a new price list, as we would have almost a month in which to get it out, and say that you drop the price 1¢ per lb. to everyone, but still give the 'six' now on the special list their ¼¢ per lb. reduction, on the carload

* The testimony showed that this was not a usual annual practice.

price on everything they purchase—I think it would take them all by surprise, for I don't think the Story Parchment Co. could afford to still give the Members of the Institute ½¢ per lb. under this 15¢ price and stand the freight to points we stand it.

* * * * * * * *

"Now, I have used 15¢ per lb. as an illustration and as a recommendation, but you can use this just so far as you care to, but it is beating the Institute's arrangements ½¢ per lb., and *I think if we gave the Story Parchment Co. a run for their money right now when they are trying to get started, that they won't feel quite so cocky*"—

to which Kindleberger replied on December 13, 1927 (K-22, R. 187):

"In the first place, let me assure you that in all their scheming and confidential stuff, they have never reckoned what 'trump cards' we hold in our hand. We have been keeping our ears close to the ground, listening and doing a lot of thinking, and *a few days ago we started the wheels agoing to do the very thing that you suggest in your letter.*

"New price lists are being figured now. These lists are all being figured to take effect January 1st. This also you want to keep to yourself and don't tell it to your very, very best friend. It might be a good thing to destroy this letter after you read it, so it won't get into the files.

* * * * * * * *

"*While it may appear that it is going to be a disturbing situation for a little while, you can rest assured that it will not last long.*"

Cashmore attempted at first to pretend that the simultaneous drop in price on January 2d by the three associates

was without communication among them. When asked to give an explanation of how it happened, he said:

> "[He] does not wish to express the thought that the other members of the Association dropped [their prices] at the same time by a coincidence. The way it happened was that Cox [Paterson's Chicago salesman] advised witness that he heard in the Trade that Kalamazoo was coming down at the first of the year. Witness did not ask the others what they were going to do because it wasn't any of his business what they were going to do. He found out through Cox" (Cashmore, R. 485).

Later he abandoned this theory and admitted that Southon in a telephone conversation "two or three days after Christmas" "said that they were coming down in their prices one cent a pound" (Cashmore, R. 512). He admitted, as well, that he had had a telephone talk with Southon on December 17th with reference to a reported cut in prices by Story (Cashmore, R. 512).

Southon testified that after the December meeting he had no recollection of any specific conference with Cashmore or Moyer by meeting or by telephone during December until just prior to Christmas, when he called by telephone from his home, first Moyer, and then Cashmore; that this was the first time he had spoken with either since the Cincinnati meeting; and that he then informed them that, effective January 2d, Kalamazoo was going to reduce its price 1 cent a pound. He does not remember what either replied (R. 528-529).

That Southon talked with Cashmore on the telephone on December 17th appeared from documentary evidence.

On December 19th Cashmore wrote Cox as follows:

> "I have your letter of the 17th in reference to Tommy Koch going with the Story Parchment Company.

"Saturday night, *I got this information from the West by telephone* adding further that it was understood that Story had reduced the general price ½¢ a pound" (P-299, R. 193).

The fact that this call was on Saturday, the 17th; that it was on Monday, the 19th, that West Carrollton sent its manuscript of the price list to the printer (Moyer, R. 540); that it was on December 15th that Southon had sent his own revised manuscript to the printer (Southon, R. 530); that on the 17th (as Cashmore admits) Southon passed on to him the report of a Story cut of ½ cent a pound, the basis of which seems to have been Greenlee's letter of December 12th (K-21, R. 183-184) suggesting a reduction of 1 cent a pound (R. 185); and that on Monday, December 19th, Cashmore, when he wrote to Cox the information which Southon had given him Saturday on the telephone, added: "It may be that we shall have to do something to offset it before long" (P-299, R. 193, at 194); all these furnish an indubitable basis for the inference that on December 17th the three associates, having been in telephonic communication, agreed together to reduce the price 1 cent a pound on January 2d in a concerted attempt to break the force of Story's competition: in the graphic language of Greenlee, to give them "a run for their money right now when they are trying to get started" (K-21, R. 183, at 186); or, in Kindleberger's even more forceful language, to arrange that Story should "get a wallop that will put their lights out" (K-22, R. 187). The defendants, to use Kindleberger's own figure of speech, were playing their "trump cards," which Story "never reckoned . . . we hold in our hands" (K-22, R. 187).

On January 2, 1928, Paterson, Kalamazoo, and West Carrollton all reduced their basic prices 1 cent a pound (16¢ to 15¢ on 40- and 50-lb. substance), the notices of all three companies going out the same day (P-11*a*, R. 197; P-12, R. 197; P-13, R. 199; K-359, R. 199; K-360, R. 199; W-109, R. 200).

Kalamazoo's notice of the reduction was mailed on January 2d (Southon, R. 529). Kalamazoo's detailed price list (K-329, R. 472), although sent in a completed form to the printer December 15th (Southon, R. 530), apparently was mailed out a few days after the January 2d notice (K-360, R. 199, at 200; "Revised price lists . . . will be ready for you in a few days").

West Carrollton's notice was sent out about January 2d with the detailed list which had been already prepared (Moyer, R. 540, and see W-109, R. 200, West Carrollton's letter of announcement, stating: "You will find enclosed copy of our new price list").

Paterson mailed out a January 2d notice on the 3d, but did not complete its detailed list until January 9th (Cashmore, R. 482).

When the basic price was determined, "all the other prices were built up from those according to size and amount." There was a regular way of computing the other prices (Cashmore, R. 478). These "differentials are calculated according to well known methods" (Leonhard, R. 473).

A glance at the price lists which are submitted as exhibits to this Court (R. 471-472) shows that detailed figuring was necessary to complete these lists. There were, therefore, some slight and inconsequential variations in the results reached by the three different companies. Cashmore, asked to figure the proportion of their business in these items where there were slight price differences, testified that it might run to 2% of Paterson's gross sales (Cashmore, R. 517).

The evidence which we have already recited shows irrefutably that the occasion and purpose of the reduction was to deliver a blow to the new Story Company. The whole discussion of price reduction centered around the Story competition. The only change in economic conditions affecting the three which had occurred was the entry of Story into competition with them.

Of course to the trade the defendants could not concede the real purpose of the reduction, so in the notice which Kalamazoo sent out it was untruthfully stated:

> "On account of the reduction in the price of rags and some items entering in to the manufacture of this paper, and the increased efficiency of our Manufacturing Department, we are able to do this" (K-360, R. 199, at 200).

And, similarly, Mayer of the Paterson Company sent a house letter to all salesmen on January 9th as follows:

> "Several of our salesmen have asked what reply they should make when questioned by the trade as to the reason for the recent price reduction, and I have suggested the following:
>
> "We are constantly striving to lower the price of Parchment Paper and whenever we feel that it is possible for us to do this we put the reduction into effect at once. *It is just a coincidence that the Story Parchment Company happens to be in the field this year when the reduction came about.* However, last year on December 11th there was a reduction of $20.00 a ton, and also the year previous on December 23rd a similar reduction. It is our constant effort to save on overheads and cost of production and whenever this is accomplished the saving is passed on to the trade. We realize that the lower we can get the Parchment price, the more paper will be consumed and find its way into new fields" (P-329, R. 214).

The comment on this explanation by Paterson's chief salesman, Cox, is illuminating:

> "Acknowledging your letter of Jan. 9th suggesting what to say when the Trade asks why we made our recent price reduction. It happens George that *we had framed up almost an identical explanation.* I had in

> mind doing this from the first, and then when KVP's letter came out—I sent a copy of it to Mr. Cashmore—and we found they were giving a similar explanation, we simply lined up on the proposition" (P-330, R. 219).

According to the defendants' information, this explanation did not deceive the trade. The reduction was no sooner announced than West Carrollton's salesman, Moody, wrote to Moyer:

> "Ruf [Cudahy's buyer] greeted me this morning with a large grin on his face—said '*What are you fellows going to do, put that new company out of biz?* We were going to place all our biz with them through the Institute and now you have cut under their price'" (W-25, R. 200)—

a comment which Moyer allowed to go unanswered.

(C) *Analysis of Evidence of Concerted Action in the Reduction of One Third in the Price of Small Printed Butter Wrappers, after the Meeting of May 14th.*

From the beginning of the Story enterprise a considerable part of its business had been in small printed butter wrappers—¼- and ½-pound wrappers—up to 63 square inches, 7 by 9. These they were selling at the list price (Goldmann, R. 558). About the middle of March, Story's Chicago salesman, Koch, made an erroneous quotation for so-called Clover Bloom wrappers to Armour & Company, and after some controversy the plaintiff compromised with that company by making a price of 53 cents for wrappers which were listed at 59 cents (Goldmann, R. 575). The evidence did not disclose that the Story Company made this price for its wrappers with any other customers. Indeed, the evidence is that they were selling their products at list until they went out of business, except for the allowance to the Institute of 2½% (Goldmann, R. 558).

Armour's business up to this time had gone principally to the Kalamazoo Company, and in part to West Carrollton.

On May 1st Greenlee wrote Kindleberger stating that he understood that the Story Company were getting a big share of Armour's butter-wrapper business; that Armour's buyer, Lovelace, informed him that on the quarter-pound Clover Bloom and Supreme butter wrappers he had a price of 53 cents per M, or just 5 cents under Kalamazoo's price.

On the same date Cox wrote Cashmore a long letter beginning:

> "Mr. Greenlee is reporting to his Mill tonight in substance as follows: . . ."

There followed, in substance, the same explanation which Greenlee had made to Kindleberger. Cox added that he had seen Lovelace and that the latter had not mentioned this new arrangement, with this comment:

> "In view of the fact that we are not supplying butter wrappers to Armour, doubtless he thought that there was no particular occasion for discussing the matter with me. Therefore, I am able to report to you only on the basis of what Mr. Greenlee told me this afternoon. . . . we weren't getting any of this Armour Clover-bloom business so we are not hurt at the moment, but I cannot imagine what is to prevent Story going into Swift with a nice little proposition on their three color Brookfield" (P-392, R. 417-418).

On the following day Moody wrote to Moyer stating that Lovelace advised him that he would have to make a better price on butter wrappers, and saying:

> "I wish you would advise me at once what to say to Lovelace in regard to lower prices on butter wrappers" (W-82, R. 420, 421).

All three companies were notified, therefore, at practically the same time of Armour's receiving a reduced price on a certain parchment product. It is important to note what followed this situation.

Southon was apparently away when Greenlee's letter arrived, and Kindleberger acknowledged it, stating:

> "We will go over this as soon as Doc [Southon] gets back and will see what we can do in the matter" (K-192, R. 419).

Cashmore, whose company was not affected, wrote Cox that he feared "the same undercurrent will work toward Swift, . . ." and "Of course you understand that we are not letting Story take any account such as Swift if we can help it and we will, of course, meet it should Story start the ball rolling with Swift." He asked Cox: "keep your eyes on the works and your ears to the ground and advise us of developments" (P-393, R. 423).

Moyer wrote to Moody that he was—

> "not prepared to say right off the bat whether or not we can make a better price on butter wrappers. . . . frankly *I do not know just now but I am going into the subject and hope to advise you more definitely within a week or two.* Until then use your ingenuity to sidestep and just say that it is being investigated or that you are having it looked up or see what can be done" (W-86, May 3, 1928, R. 425, 426).

Greenlee wrote again to Southon on May 8th on the same subject (K-174, R. 431).

Southon, who had arrived home by the 9th, on that day wrote Greenlee as follows:

> "I have just finished reading your letter of May first, addressed to Mr. Kindleberger and also your letter of May 8th addressed to me relative to the above mentioned subject.

"I am going to ask you to leave this matter in abeyance for a few days until after I can see what can be done.

"I think by *the early part of next week* we shall be in a position to tell you definitely what can be done" (K-364, R. 432).

The following telegrams were then exchanged between Southon and Dohan:

"Can arrange to be in New York or Philadelphia Saturday Please wire" (K-239, R. 434).

"Have arranged meeting ten o'clock day light McAlpin Hotel New York next Monday stop Wire at once if not satisfactory" (K-240, R. 434).

"Arrangements are satisfactory will see you Monday" (K-241, R. 434).

"This will confirm my telegram of this morning advising you that the arrangements which you have made for a *meeting next Monday on the Import situation** are satisfactory to me.

"I will leave Kalamazoo Sunday noon and will arrive in New York about nine o'clock Monday morning" (K-242, R. 434).

Monday was the 14th. On that date the three members of the Parchment Association met with Dohan at the McAlpin Hotel in New York (Cashmore, R. 480; Southon, R. 534).

Cashmore testified that "there was no agreement" that they would all cut the price of printing on these small sheets by one third; that they did not speak of making a cut in the price of printing or reducing the price at that meeting

* Leonhard, general manager of Paterson, had testified that the association among other things discussed prices (R. 474), and Cashmore testified that the term "imports" was "a term in the nature of a fiction" to express the generic character of his (Dohan's) services, that it originated in "just a common suggestion of the group" (Cashmore, R. 480).

(Cashmore, R. 481); that Southon said they (Kalamazoo) were going to reduce in order to save their business on these small sheets, which were being sold in large quantities by Story at a lower price; he (Cashmore) replied that "Paterson could not help but do the same thing if Kalamazoo did it;" he does not know what Moyer said (Cashmore, R. 481); nevertheless, "Each went home and reduced on this one third," and "This price on smaller sizes was made more specific to hit the exact price and exact size which Story was selling and to meet their competition" (Cashmore, R. 481).

Southon testified that the meeting lasted about three hours; that Story competition was not discussed "any more than it had been before"; that it was "just a matter of relation of experiences."

"Q. Particularly with reference to printing prices? A. I think regarding everything.

"Q. Did you mention printing prices? A. I think I myself mentioned printing prices.

"Q. Do you remember what you said about it? A. Not definitely, no.

"Q. Do you remember anything that any of the others said about it? A. I don't think they said anything.

"Q. Do you recollect anything that was said at that meeting by any one of you? A. No, I believe at that meeting it was I made the statement that we were experiencing—by 'We' I mean Kalamazoo—some very mean competition from Story on a small butter wrapper—printed butter wrapper—and that the buyers were just in their glory to think they could Jew us down on the price and that because of the fact that we had always carried in stock large quantities of those butter wrappers, that we were going to meet Story's price on them.

"Q. What did they say? A. They did not comment.

"Q. Do you remember anything else that was said? A. No, I don't recall anything definitely.

"Q. By anybody? A. No.

"Q. On any subject? A. No; we just talked about matters in general and I don't recall now what they were.

"Q. Did Mr. Cashmore say that they had met with similar competition in the butter wrapper business? A. I don't recall him saying so.

"Q. Did Mr. Moyer? A. I don't recall him saying so.

"Q. You carry no impression in your memory as to whether they said anything about such competition? A. I have no recollection of either of them saying anything about it.

"Q. . . . did either of them say anything as to their reducing the prices of butter wrappers? A. No.

"Q. What did you understand was the purpose for which the meeting was called? A. At that particular time?

"Q. Yes. A. I don't recall.

"Q. Well what result did you understand that the meeting accomplished? A. I don't know as it accomplished any particular result. We merely discussed matters generally relating to the industry.

"Q. But you cannot remember anything more about anything that was said than you have already stated? A. Not definitely" (Southon, R. 534-535).

Moyer testified that at the meeting he told the others that "Armour had notified West Carrollton that unless they made a better price on printed parchment, and quarter-pound wrappers especially, they were going to take the business away from them; that Story was making better prices and they could not afford to pay more. Southon said they had brought the same proposition up to them. Cashmore did not say anything. Witness does not think at that time it hit him. . . . Cashmore did not say at the meeting

that Paterson would reduce its prices on printing. Southon said Kalamazoo was going to make a new panel for sizes under 63 square inches, at a lower price. He stated what the price was to be. Witness did not state that he was going to do likewise, but *he made a mental note that he was going to do so,* because he could not do otherwise if they cut the price. He did not communicate to the others in any kind of language or gesture that he was going to make that reduction but he made it as soon as he got home" (Moyer, R. 544).

While all three witnesses thus tried to create the impression that there was no agreement to make a price reduction, their testimony is incredible in view of what immediately followed.

The price reduction made by all three companies following the meeting was identical. It formulated a new bracket for sizes up to and including 63 square inches. These had previously been included in sizes up to 117 square inches, which made a reduction of about 6 cents a thousand on printing on the maximum quantity, and as the former price was 18 cents it was a reduction of one third. It was applicable only on sizes up to and including 63 square inches (Cashmore, R. 480; P-10, R. 471; K-331, R. 472; Moyer, R. 544; Goldmann, R. 558).

Southon admittedly declared his decision at the meeting, and he went immediately home after the meeting—"within a day or two" (Southon, R. 535). Kalamazoo's notice of the reduction went out with an "effective" date of May 15th (K-331, R. 472).

Moyer admitted that at the conference "he made a mental note" that he was going to make the same reduction (Moyer, R. 544); that he made the reduction "as soon as he got home," and sent out his notice "as soon as he could print it after getting home." It "went out May 17" (Moyer, R. 544), although the covering letter to the salesmen is dated May 21st (W-113, R. 459).

There seemed to be an effort on the part of both Cashmore and Moyer as witnesses to make it appear that Paterson did not make the reduction until May 24th, ten days after the meeting. Cashmore so testified at first: "On May 24th Paterson cut these printing prices one third" (Cashmore, R. 480). Moyer, when asked if it came to his attention that Paterson's notice "was effective May 14," thought "that that is wrong by ten days" (Moyer, R. 544), apparently adopting Cashmore's previously given evidence. But, if Cashmore's testimony means anything more than that the new printed list was sent out on that date, it was flatly contradicted by documentary proof. The list bears an effective date of May 14th, and the company's order to its printer accompanying the price list showed date of May 18th, which forced Cashmore to acknowledge that his figures had been completed at least as early as that date (P-10, R. 471; Cashmore, R. 517). A letter from Cox to Cashmore dated May 19th says:

> "*In your letter of May 16th, with which you sent me new printing prices 63 square inches and under,*" etc. (P-441, R. 450, 451)—

and another letter from Cox, to Cherry Company, written the 16th, proves that he had received notice by telephone on that day from Passaic that the price reduction had been made:

> ". . . just before I started to dictate this letter, *I was on the phone with Passaic and was informed that a new bracket has been created in our Printing List.* Bracket B is divided into two parts the 1st will be up to and including 63 square inches, and the second exceeding 63 square inches up to and including 117 square inches. The latter will have the same prices now appearing in Bracket B. I have not the complete details of the new bracket up to and including 63 square inches, but there will be a substantial reduction.

"For example, one million quantities will be

One color	12¢
two colors	20¢
three colors	25¢

as against 18¢ 25¢ and 32¢ as formerly" (P-407, R. 441, 442).

(D) *Plaintiff did Not Lead in Price Reductions.*

Defendants' brief lays great stress upon the argument that it was the plaintiff which started the price cutting and throughout led in making price reductions. This is not the fact (Deft. Br. 13-16).

Defendants' statement in their brief (p. 13) that "Prior to each . . . reduction, Story had broken the price below the wholesale price of any defendant" is particularly misleading. Plaintiff from the outset adopted both the wholesale and retail lists of the defendants, but their competition was entirely in the wholesale field and dealt entirely with wholesale prices.

All that there is to justify the defendants in their contention that Story was the first to cut prices is that it offered a commission of 5% to jobbers and extended this offer, or a commission of 2½%, to certain associations of consumers which had set up an organization to buy for its members.

We are not ourselves impressed by the distinction between a discount and a commission when either is allowed to a purchaser.

If it makes any difference, however, it is to be noted that Story's officers did genuinely believe that the allowance made should be termed a commission rather than a discount. The sales policy adopted by the plaintiff company immediately upon its organization was to sell at wholesale only, and exclusively through jobbers and to the buying organizations of trade associations, and not directly to consumers. As they intended to employ no sales agents, they

regarded the jobbers as their agents and entitled to the compensation which agents would receive (Goldmann, R. 547).

This was not a new practice in trade and commerce in parchment. The three established companies did the same thing. Paterson allowed a commission or discount to fourteen different jobbers in 1927, and to three additional jobbers beginning January 1, 1928 (Cashmore, R. 503-504). Moyer allowed a commission to Sills, a jobber in New York, although he objected to stating its amount (Moyer, R. 538). There is no direct testimony as to Kalamazoo's practice in this matter, but it must have known that such an arrangement existed on the part of the others, if it did not itself have similar agreements with jobbers.

All the defendants, moreover, had always allowed a discount of ¼ cent a pound to the big packers, commonly referred to as the Big Four—Cudahy, Armour, Wilson, and Swift—and perhaps to others (see K-21, R. 183, 185, letter of December 12, 1927, Greenlee to Kindleberger, "but still give the '*six*' now on the *special list* their ¼ cent per lb. reduction, . . .").

What Story did, however, and what seemed monstrous to the defendants, was to offer the 5% commission or discount *to all jobbers*, to some of whom the defendants did not extend it, and to offer a 2½% on all purchases made through the American Institute of Meat Packers, which was an association of all the meat packers, one function of which was that of a collective buying agency (Goldmann, R. 550; *cf.* P-321, Cox to Cashmore, February 18, 1928, R. 304, attaching list of members of the American Institute of Meat Packers, P-321*b*, R. 306).

The list prices which the plaintiff at first adopted were those which were shown in price lists of the defendants effective December 11, 1926 (S-1, R. 472; Goldmann, R. 548-549). The defendants were so informed by their sales agents (W-6, R. 127; K-12, R. 137; P-296, R. 137-138; W-11, R. 141-142; K-15, R. 161, 162).

When the price reduction of January 2, 1928, was made by the associated companies, it came upon Story like "lightning out of a clear sky." They had no idea that it was coming. They immediately held a hasty conference and made their own announcement of January 4th (Goldmann, R. 553; see also S-3, R. 472). Story's price bulletin was dated January 7th and its detailed price list was sent out on January 15th or a little later. The new prices were practically the same as those of the three other companies (Goldmann, R. 554).

An example of the progress of price reduction in the months of January and February, 1928, is shown in the following table, based upon a price of 40-pound substance, the basic weight.

Price of 40 lb. substance, the basic weight.

January 2d list price	.15
Price given by the defendants to the Big Packers (list minus ¼¢)	.1475
List price minus 2½% given by Story to members of the Institute including the Big Packers (see S-4, R. 236)	.1462½
Defendants' price, effective February 11th to Institute members not the Big Packers (adopting Story's price)	.1462½
Defendants' price announced February 11th to Big Packers (list minus ¼¢ minus 2½%)	.1438
Defendants' price, effective February 29th, to members of the Institute not the Big Packers	.1425
Defendants' price, effective February 29th, to Big Packers (list minus ¼¢ minus 5%)	.1401

It will thus be seen that about February 11th the defendants adopted Story's price to all members of the Institute, but to the Big Packers gave a price .0024½ under Story's, and that at the end of February they announced a price to

all members of the Institute of .0037½ under Story's and to the Big Packers .0051½ under Story's price.

While, therefore, the defendants talked in their letters about "meeting" Story's price, it will be seen that they unitedly adopted prices under Story's.

VII.

The judgment of the Court of Appeals should be reversed and the judgment of the District Court for plaintiff should be affirmed, there being no merit in other assignments of error.

As this case is before the court on writ of certiorari, this Court may dispose of all questions and determine the case on the record. This procedure is particularly appropriate to the case at bar as the only assignments of error of defendants which were not discussed in the opinions of the Court of Appeals are mere minutiæ.

(1) The second assignment of error (R. 607)—that the court denied defendants' motion to set aside the verdict—presents no question for review. *Boston & Maine R.R.* v. *Dutille,* 289 Fed. 320, 324 (C.C.A. 1).

(2) The third assignment of error (R. 607) relates to a portion of the charge of the court permitting the jury to find whether plaintiff was damaged through being compelled, in order to carry on business, to sell at the reduced prices fixed by the defendants. The conditions precedent to such a finding were very carefully stated. The court also instructed the jury that such damage could not be recovered unless they found that the price prior to defendants' reduction was a reasonable price. The exception as stated by defendants (R. 604) did not question the rule of law as stated by the court, but rather the applicability of the rule to the evidence in the case. That furnishes no basis for claiming reversal on the ground that the charge was incorrect in law. *United States* v. *U.S. Fidelity & Guaranty Co.,*

236 U.S. 512, 529. Furthermore, the question of law was fully considered in the Court of Appeals in connection with the first assignment of error (R. 618), and defendants' counsel in the Court of Appeals treated it as a matter involved in the first assignment.

(3) The fourth assignment of error (R. 607-608) relates to a portion of the charge of the court dealing with damage through diminution in value of plaintiff's property. Counsel for defendants suggested that such damage could not be allowed unless the jury found that, if there were no combination, the plaintiff would have been able to go on in business, would have had an active business. The court agreed to this. The defendants' counsel still saved an exception (R. 604-605), but the exception, here again, was directed, not to the rule of damages, but to the jury's being permitted to apply that rule to the case. Furthermore, the question of law involved in this phase of the charge was fully considered by the Court of Appeals and discussed in the opinions.

(4) The fifth assignment complains of the trebling of damages (R. 608). That is plainly provided by the Sherman Act (July 2, 1890, c. 647, sec. 7).

(5) The sixth assignment complains of witness Goldmann of the plaintiff company being permitted to state the fair market value of the plant on June 1, 1928 (R. 608). He was the treasurer and general manager of the company throughout its history. He negotiated the purchase of the factory site, the contracts for the construction of the building, the purchase of the parchmentizing machine and all other equipment. He approved every purchase, knew costs. He testified he was able to estimate the value of the plant, and there was nothing to show he was not able to do so. An owner may testify as to the value of his property and the witness was sufficiently representative of the owner. Any witness personally sufficiently familiar with property to give an opinion of its value, may testify as to its value. The

court was amply justified in permitting the witness to give his opinion. *Montana Ry. Co.* v. *Warren,* 137 U.S. 348.

(6) The seventh assignment of error (R. 608) relates to an answer which merely fixed the time when witness learned of a prospective cut in price, as to which he had already testified. Moreover, no objection was made until after it had been answered and a new question was being asked. It was within the discretion of the court as to whether the question and answer should be stricken when no prior objection had been made to the answer. *Rich* v. *Rogers,* 250 Mass. 587, 589. *N.Y. Life Insurance Co.* v. *Rees,* 19 Fed. (2d) 781.

(7) The eighth assignment (R. 608) involves an objection to a witness's being permitted to state his conversation with Moyer. Moyer was general manager of the West Carrollton company, one of the three conspirators. The declarations of each conspirator, if in furtherance of the conspiracy, are admissible against all. *Hitchman Coal & Coke Co.* v. *Mitchell,* 245 U.S. 229, 249.

Furthermore, this conversation, just as the witness narrated it, went into evidence without objection, in two letters (R. 444, R. 446).

(8) The ninth assignment (R. 608) sets forth the denial of the defendants' motion to enter verdict for defendants and defendants' motion for judgment for defendants. We have pointed out the manifest errors of the Court of Appeals in ordering judgment for the defendants.

We submit, therefore, that this Court should affirm the judgment of the District Court.

Respectfully submitted,

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